Supreme Court, U.S.
FILED

961604 APR 8 1997

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No.

In The

Supreme Court of the United States

October Term, 1996

JOHN P. COOKE, TORREY M. COOKE,

Petitioners,

vs.

NICHOLAS R. DINAPOLI, JR., Trustee,
CARL H. LECHER, Trustee,

Respondents.

Petition for Writ of Certiorari to the Appellate Court of the State of Connecticut

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the courts of the State of Connecticut, by failing to apply their own law with respect to interference with business expectancies and proximate cause, have violated petitioners' constitutional right to equal protection of the law under the Fourteenth Amendment to the United States Constitution and unjustly punished them for exposing and seeking to prevent a violation of the Connecticut charitable use statute.

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We, John P. Cooke and Torrey M. Cooke, respectfully pray that a Writ of Certiorari issue to review the judgment of the Appellate Court of the State of Connecticut entered on October 1, 1996. Our timely petition for certification to the Supreme Court of the State of Connecticut was denied on December 4, 1996 and our timely motion for reargument and reargument *en banc* to the Supreme Court of the State of Connecticut was denied on January 8, 1997

OPINIONS BELOW

The order of the Supreme Court for the State of Connecticut denying our motion for reargument and reargument *en banc* is printed hereto at page 1a of the Appendix. The order of the Supreme Court of the State of Connecticut denying our petition for certification is printed at page 2a of the Appendix. The opinion of the Appellate Court of the State of Connecticut is printed at page 4a of the Appendix. The opinion of the Superior Court of the State of Connecticut for the Judicial District of Danbury at Danbury is printed at page 20a of the Appendix.

STATEMENT OF JURISDICTION

The opinion of the Appellate Court of the State of Connecticut was filed on October 1, 1996. Our petition for certification to the Supreme Court of the State of Connecticut which was timely filed was denied on October 4, 1996. Our motion for reargument and reargument *en banc* which was timely filed was denied by the Supreme Court of January 8, 1997. This Court has jurisdiction to review the judgment of the Appellate Court for the State of Connecticut by Writ of Certiorari pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

There are no statutory provisions directly involved.

STATEMENT OF THE CASE

In this case the plaintiffs (respondents) asserted one cause of action against the defendants (petitioners) alleging interference with business expectancies. Their sole claim for damages was that a payment to them pursuant to a settlement agreement with the State of Connecticut was delayed by nine months. On August 24, 1994, the trial court found for the respondents but found that they had failed to prove their damages. It awarded them $1.00 in compensatory damages and $21,080 in punitive damages. On October 1, 1996 the Appellate Court affirmed the trial court's judgment with one judge dissenting. On October 18, 1996 the petitioners filed a petition to the Supreme Court of Connecticut for certification to appeal from the Appellate Court's decision. The petition was denied on December 4, 1996. On December 13, 1996, the petitioners moved for reargument and reargument *en banc*. The motion was denied on January 8, 1997.

The facts of this case are as follows:

1. The respondents entered into an agreement with the State of Connecticut settling a reverse condemnation suit in which the State agreed to pay them 2.8 million dollars in return for the conveyance of two parcels of property. One of the parcels called for by the agreement was not owned by the respondents but was an open space parcel owned by the Town of Ridgefield which abuts the petitioners' property.

2. After the agreement was made, the respondents persuaded the Town of Ridgefield to convey to them the open space parcel which they required to complete the transaction with the State in exchange for the conveyance to the Town by the respondents of another parcel of like acreage.

3. The parcel to be conveyed by the Town to the respondents was part of an open space parcel which had been conveyed to the Town upon specific condition recited in the deed that the property be maintained by the Town "in its natural state in perpetuity".

4. The petitioners sued the Town and the Attorney General to enjoin the conveyance or to have the Attorney General prevent the conveyance alleging that the conveyance of the parcel by the Town violated the charitable trust and/or charitable use statutes of Connecticut State, §§ 45-79 and 47-2 of the Connecticut General Statutes. These statutes require that such grants "remain to the use to which they were granted . . . and to no other use whatsoever."

5. The Superior Court dismissed the petitioners' claim for lack of standing but found that the conveyance to the respondents without court approval would indeed violate the charitable use statute, § 47-2. It also dismissed the petitioners' mandamus action against the Attorney General noting that the Attorney General had commenced action to assure that the Town obtained such court approval before conveying the property to the respondents.

6. At the insistence of the Attorney General, the Town of Ridgefield commenced a cy pres action to obtain the court approval required to convey the property to the respondents. Thereafter the State of Connecticut agreed to accept from the respondent a different parcel than that which was the subject of the cy pres action. The settlement with the State was closed and payment was received by the respondents.

7. Thereafter, the Town abandoned the cy pres action and the required approval was never obtained. Thus even today, the town could not convey that parcel to the respondents.

It is clear from the above facts that the reasons for the delay in the closing of the respondents' agreement with the State was that they did not own the property which they had agreed to convey to the State and that the Town could not convey it to them without court approval which was never obtained.

The petitioners have been unjustly deprived of the application of fundamental principles of law pertaining to the showing of actual damages required to make out a claim for interference with business expectations and the requirement in all cases that a defendant's conduct must be the proximate cause of the plaintiff's injury.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION RAISES THE IMPORTANT ISSUE OF WHETHER LITIGANTS ARE CONSTITUTIONALLY ENTITLED TO HAVE THE STATE COURTS APPLY THEIR LEGAL PRINCIPLES IN A CONSISTENT AND EVENHANDED MANNER.

State courts must be constitutionally required to apply their legal principles in a consistent manner and, when they fail to do so, litigants who are adversely affected by such failure have suffered a violation of their constitutional right to equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution. In this case the petitioners have been punished by the arbitrary, capricious, and inconsistent application of well established legal principles in the State of Connecticut relating to the requirements for establishing the tort of interference with business expectancies and the requirement that a defendant's conduct be the proximate cause of the plaintiff's injury.

The equal protection clause of the Fourteenth Amendment commands that no state shall deny to any person within its jurisdiction the equal protection of the laws. It is essentially a direction that all persons similarly situated should be treated alike. *Cleburne v. Cleburne Living Center Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). With some exceptions, State action concerning social and economic regulation will survive an equal protection challenge if it satisfies a rational basis test. The exceptions relate to state action that invidiously discriminates against a suspect class or *state action that affects a fundamental right. G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408, 102 S. Ct. 1137, 71 L. Ed. 2d 250 (1982).

The State action complained of here is the failure of the trial and appellate courts of the State of Connecticut to apply clear and well established legal principles to the petitioners as they have to litigants similarly situated with the result that the petitioners' fundamental right to have the benefits of these principles has been violated. Defendants similarly situated to the petitioners have been found liable for the tort of interference with business expectancy only when the plaintiff has proven actual damages and only when the plaintiff has proven that the defendant's conduct was the proximate cause of its injury. These principles have not been applied in this case with the result that petitioners have suffered the loss of a fundamental right to the protection afforded by these principles of law when correctly applied.

II.

THE RESPONDENTS IN THIS CASE FAILED TO PROVE THEIR ACTUAL DAMAGES WHICH IS AN ESSENTIAL ELEMENT OF THE TORT OF INTERFERENCE WITH BUSINESS EXPECTATIONS.

The trial court found, and the Appellate Court agreed, that the respondents failed to prove the measure of their damages. The majority of the Appellate court found that proof of the quantum of the respondents' damages is not necessary to make out a cause of action for tortious interference with a business relation. In so doing it misinterpreted prior decisions of this Court and failed to follow even its own decisions on this issue. The prior decisions of this Court and of the Appellate Court require a plaintiff to prove actual loss and hold that such proof is an essential element of a claim for tortious interference. *Riccio v. Abate,* 176 Conn. 415, 418-19 (1979); *Herman v. Endriss,* 187 Conn. 374, 377 (1982); *Harry A. Finman & Son v. Connecticut Truck & Trailer Service Co.,* 169 Conn. 407, 415 (1975); *Goldman v. Feinberg,* 130 Conn. 671 (1944); *3 Dooley, Modern Tort Law,* 44.03, p. 216; *Prosser,* Torts (4th Ed.) 130, p. 953.

In *Taylor v. Sugar Hollow Park, Inc.,* 1 Conn. App. 38, 39 (1983), the Appellate Court itself held that this tort does not give rise to nominal damages, which were awarded here by the trial court, and that a plaintiff's failure to prove its actual damages in a claim for the tort of unlawful interference with business relations is "fatal" to its cause of action.

The Appellate Court's conclusion that the term "actual damage" refers only to the fact of damage and not the amount is clearly in error. Since the turn of the century, the Supreme Court of Connecticut has used the term "actual damage" to mean

the quantum or the amount of damage suffered by the plaintiff and not the fact of damage. *See Dudley v. New Britain*, 77 Conn. 322, 325 (1904). (". . . the actual damage to the property by the wrong of the defendant was at least $12,000."); *Illustrated Postal Card and Novelty Co. v. Holt*, 85 Conn. 140, 143 (1912) ("The actual damage suffered was the recovery upheld. That was, as a rule, measured by the difference between the price of the contract of sale and the value of the goods made."); *Morrell v. Wiley*, 119 Conn. 578, 585 (1935) ("As already pointed out, the plaintiff's actual damage could not be the full amount he paid for the reason that the stock he received was not then without value."); *May v. Young*, 125 Conn. 1, 8 (1938) ("In such a case recovery would be limited to actual damage and if no damage is proven no recovery may be had."); *Beach v. Trumball*, 133 Conn. 282, 284 (1946) ("This presents the question whether upon the above facts the plaintiffs are entitled by virtue of the statute to recover their actual damage, claimed to be $740.00. . . ."); *Keller v. Carone*, 138 Conn. 405, 406 (1951) ("Even though the defendants had admitted liability, the burden of proof as to the amount of actual damage sustained was upon the plaintiff."); *State v. Hickam*, 235 Conn. 614, 618 (1995) ("Each violation involved a billing to medicare for $12 for reimbursement for medical services worth only $3. The actual damage to the government as a result of the defendant's scheme was $585."); *Division 163 v. Connecticut Co.*, 148 Conn. 563, 571 (1961) ("Where the act of a complainant makes it necessary for a defendant to expend his money to rid himself of an illegal or unjust restraint, the loss thus suffered is an actual damage which the defendant has suffered by reason of the restraint.").

It is thus clear that the word "actual damage" as used in the opinions of the Supreme Court and of the Appellate Court refer to a quantum of damage and not merely the fact of damage. It is the term "actual" which modifies the word "damage" that compels the interpretation of that phrase as referring to a

particular amount of damage. "Damage" is a loss or injury. "Actual damage" is the measure of that injury and refers to the plaintiff's real loss or injury. Black's Law Dictionary (Revised 4th Ed. 1968). The tort of tortious interference requires not merely a showing of damage but of *actual* damage. The respondents failed to prove actual damages.

III.

A DEFENDANT CAN NOT BE LIABLE WHERE THE CONDUCT COMPLAINED OF IS NOT THE PROXIMATE CAUSE OF THE PLAINTIFF'S INJURY.

In Connecticut, a plaintiff must prove that the defendants' alleged conduct was the proximate cause of its damages. *Preston v. Keigh*, 217 Conn. 12 (1991). In order for a plaintiff to recover damages the causal relationship between the defendants' wrongful conduct and the plaintiffs' injuries must be established. *Kilduff v. Adams, Inc.*, 219 Conn. 314 (1991); *Miller v. Appleby*, 183 Conn. 51 (1981). The plaintiff bears the burden of proving an unbroken sequence of events that ties his injuries to the defendant's conduct. *Wu. Administrator v. Town of Fairfield*, 204 Conn. 435, 438-39. *See also Terrani v. Century Medical Center*, 7 Conn. App. 301 (1986) and *Heyman v. CBS, Inc.*, 178 Conn. 215 (1979).

Here the evidence at trial showed that Mrs. Cooke was vindicated in her assertion that the exchange violated the public interest in that it sought to convey property which was subject to the charitable use statute of the State of Connecticut. The decision dismissing her suit expressly acknowledges that the respondents had admitted that the property was the subject of the charitable use statute and confirmed that the proposed conveyance by the town would be in violation of that statute without prior court approval. Indeed her mandamus claim against

the Attorney General was dismissed because the Attorney General had stepped in to enforce the charitable use statute and had insisted that the town commence a cy pres action before conveying the property to the respondents.

In *Stewart v. Fed. Department Stores, Inc.*, 234 Conn. 597 (1995), the Supreme Court of Connecticut reviewed the principles of legal causation. The court's analysis of those principles appears at pages 605 and 606:

> Cause in fact, occasionally referred to as actual cause, asks whether the defendant's conduct "caused" the plaintiff's injury. Thus, if the plaintiff's injury would not have occurred "but for" the defendant's conduct, then the defendant's conduct is a cause in fact of the plaintiff's injury. Conversely, if the plaintiff's injury would have occurred regardless of the defendant's conduct, then the defendant's conduct was not a cause in fact of the plaintiff's injury. W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 41, p. 266. Here, the court correctly defined cause in fact as: "Would the injury have occurred were it not for the [defendant's] negligent . . . conduct . . . ?" See Doe v. Manheimer, 212 Conn. 748, 757, 563 A.2d 699 (1989).
>
> Philosophically, cause in fact is limitless; "but for" the creation of this world, no crime or injury would ever have occurred. W. Prosser & W. Keeton, supra, p. 264. The philosophical sense of causation includes the "great number of events without which happening would not have occurred . . . yet

the effect of many of them is so insignificant that no ordinary mind would think of them as causes." 2 Restatement (Second), Torts § 431, comment (a) (1965). [fn6] Therefore, as a practical matter, limits must be established. Lines bust be drawn determining how far down the causal continuum individuals will be held liable for the consequences of their actions. W. Prosser & W. Keeton, supra, § 42, p. 273. This line is termed "proximate cause."

Proximate cause establishes a reasonable connection between an act or omission of a defendant and the harm suffered by a plaintiff. Id., § 41, p. 263. Proximate cause serves to "[temper] the expansive view of causation [in fact] . . . by the pragmatic . . . shaping [of] rules which are feasible to administer, and yield a workable degree of certainty." (Internal quotation marks omitted.) Doe v. Manheimer, supra, 212 Conn. 757-58. In other words, legal cause can be portrayed pictorially as a Venn diagram, with the circle representing cause in fact completely subsuming the smaller circle representing proximate cause, which specifically focuses on that which we define as legal causation. This court has defined proximate cause as "[a]n actual cause that is a substantial factor in the resulting harm . . ." (Emphasis added.) Id., 757; Mahoney v. Beatman, 110 Conn. 184, 195, 147 A. 762 (1929).

When this analysis is applied to this case, there can be little doubt that the petitioners' conduct was not the proximate cause of the respondents' harm. The respondents' payment from the State would have been delayed regardless of the petitioners' conduct because they could not lawfully obtain title to the open space parcel from the Town because of the requirements of the charitable use statute.

The Supreme Court of Connecticut has reiterated time and time again that the defendant's conduct must be the proximate cause of the plaintiff's injury. The decision of the trial court, of the Appellate Court and of the Supreme Court in this case flies in the face of this fundamental principle. The following list of Connecticut cases are representative of the basic legal principle which, if properly applied in this case, would have barred recovery by the respondents:

Bohan v. Last, 236 Conn. 670, 677 (1996)
Gore v. Peoples Savings Bank, 235 Conn. 360, 365 (1995)
Donner v. Kearse, 234 Conn. 660, 681 (1995)
State v. Munoz, 233 Conn. 106, 117-24 (1995)
Preston v. Keith, 217 Conn. 12, 16 (1991)
Kilduff v. Adams, Inc., 219 Conn. 314, 326 (1991)
Wu. Administrator v. Town of Fairfield, 204 Conn. 435, 438-39 (1987)
Catz v. Rubenstein, 201 Conn. 39, 44 (1986)
Borkowski v. Sacheti, 43 Conn. App. 294, 311 (1996)
Brown v. Board of Education of the City, 49 Conn. App. 824, 827 (1996)
Battistoni v. Weatherking Products, Inc., 41 Conn. App. 555, 560, 562 (1996)
Phinney v. Casale, 40 Conn. App. 495, 500 (1996)
Esposito v. Schiff, 38 Conn. App. 726, 729 (1995)
Shegog v. Zabrecky, 36 Conn. App. 737, 745 (1995)

The issue of proximate cause is fundamental to our jurisprudence and has been improperly applied by both the trial court, the Appellate Court and the Supreme Court.

It is just such a situation as this in which this Court must act if it is to carry out its obligation of judicial supervision to assure that errors committed by the State courts, which amount to a violation of a litigant's right to equal protection of the law, are reviewed and corrected.

CONCLUSION

For all of the above reasons, the Petition for Certification should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF CONNECTICUT FILED JANUARY 8, 1997

STATE OF CONNECTICUT
SUPREME COURT

NO. PSC-96-0211
DBD C89-0299304S

NICHOLAS R. DINAPOLI, JR., TRUSTEE, ET AL.

v.

JOHN P. COOKE ET AL.

JANUARY 8, 1997

ORDER

THE MOTION OF THE DEFENDANTS, FILED DECEMBER 16, 1996, FOR REARGUMENT AND REARGUMENT EN BANC, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED. BERDON, J., WOULD GRANT.

BY THE COURT,

s/ Francis J. Drummond
CHIEF CLERK

NOTICE SENT: 1/8/97
PAUL L. BOLLO
CUTSUMPAS, COLLINS, HANNAFIIN, GARAMELLA, JABER & TUOZZOLO, P.C.
CLERK, DANBURY J.D. (CV89-0299304)
HON. HOWARD J. MORAGHAM
RJD

APPENDIX B — ORDER OF THE SUPREME COURT OF THE STATE OF CONNECTICUT DATED DECEMBER 4, 1996

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-96-0211

Nicholas R. Dinapoli, Jr., Trustee, et al.

v.

John P. Cooke et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendants for certification to appeal from the Appellate Court (43 Conn. App. 419 [AC 14290]), it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

s/ Alan M. Gannuscio
ASSISTANT CLERK-APPELLATE

Dated: December 4, 1996
Notice sent: 12/5/96
Clerk, Superior Court, Danbury 0299394S
Clerk, Appeliate Court
Reporter of Judicial Decisions
SAO
Paul L. Bollo

Appendix B

Cutsumpas, Collins, Hannafin, Garamella,
Jaber & Tuozzolo, P.C.
Lawrence G. Widem, Assistant Attorney General

Paul L. Bollo in support of petition.

APPENDIX C — OPINION OF THE APPELLATE COURT OF THE STATE OF CONNECTICUT DATED OCTOBER 1, 1996

NICHOLAS R. DINAPOLI, JR., TRUSTEE, ET AL. *v.*
JOHN P. COOKE ET AL.
(14290)

Foti, Lavery and Spear, Js.

* * *

FOTI, J. The defendants[1] appeal from the judgment of the trial court rendered in favor of the plaintiffs[2] on their complaint and on the defendants' counterclaim. The plaintiffs' complaint alleges that the defendants tortiously interfered with their sale of the land to the state of Connecticut. The defendants' counterclaim alleges that the plaintiffs breached a contract with the defendants with respect to a portion of the subject land and that the plaintiffs violated the Connecticut Unfair Trade Practices Act (CUPTA), General Statutes § 42-110a et seq.[3] The defendants assert that the trial court (1) improperly found that the plaintiffs proved the malice and proximate cause elements of the tort of intentional interference with a business relationship, and that the plaintiffs had not breached their agreement and had not engaged in unfair or deceptive trade practices, and (2) abused its discretion in awarding punitive damages. The plaintiffs cross

1. The defendants are John P. Cooke and Torrey M. Cooke.

2. The plaintiffs are Nicholas R. DiNapoli, Jr., trustee, and Carl H. Lecher, trustee.

3. General Statutes § 42-110b(a) provides: "No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

appeal, claiming that the trial court improperly (1) found that the plaintiffs did not prove damages and, consequently awarded only nominal damages, and (2) limited punitive damages to attorney's fees. We affirm the judgment on the complaint and on the counterclaim.

The relevant facts and procedural history are as follows. The plaintiffs owned a forty-nine acre tract of land situated on Nod Hill and Old Branchville Roads in Ridgefield. On November 18, 1986, they obtained approval from the Ridgefield planning and zoning commission for a planned residential development on the property. As a condition of the approval, the plaintiffs were required to convey approximately eighteen acres of the subdivision to the town of Ridgefield to be dedicated as open space. The plaintiffs conveyed the eighteen acres to the town on November 20, 1986.

On January 30, 1987, the state department of transportation advised the plaintiffs that the state was going to acquire a portion of their property for the reconstruction of Route 7. Prior to conveying the eighteen acres to the town, the plaintiffs had inquired of the department of transportation on two occasions whether there were planned condemnation proceedings against their property. In each instance, they were told that the plans for Route 7 were dormant. The plaintiffs ceased their construction activities on the subdivision roadway after the notice of the forthcoming condemnation.

In March, 1988, the state informed the plaintiffs that the plan to acquire a portion of their property had been postponed indefinitely. The plaintiffs initiated an inverse condemnation action against the state that ultimately was settled by way of a stipulated judgment. The terms of the stipulation required the

state to pay to the plaintiffs the sum of $2,800,000. In return, the plaintiffs were to convey two noncontiguous parcels to the state totaling eighteen acres. One of the parcels (parcel A) consisted of approximately ten acres from the open space portion of the subdivision. The stipulation necessitated a reacquisition of the ten acre parcel that the plaintiffs had previously conveyed to the town and the substitution of another ten acre parcel (parcel B) to meet the open space requirement. The other parcel to be conveyed to the state (parcel C) was eight acres from another portion of the subdivision. The stipulation provided that the entire $2,800,000 was to be paid for parcel C and that parcel A was to be transferred for "no consideration." The town approved the plaintiffs' proposal to substitute parcel B for parcel A as open space to comply with a condition of the subdivision approval. This approval took place at a town meeting on February 22, 1989.

The defendants own a parcel of land that partially abuts the plaintiffs' property. They entered into an agreement with the plaintiffs on November 6, 1986, in which they agreed not to oppose the development of the subdivision, and the plaintiffs agreed, inter alia, to give the defendants an option to purchase lot 1 of the subdivision for a price equal to 85 percent of the fair market value of the lot.

The defendants opposed the substitution of parcel B for parcel A at the February 22, 1989 town meeting. Thereafter, Torrey Cooke brought an action to preclude the property exchange, claiming that such an exchange violated certain statutory provisions regarding public and chartiable uses. The case was subsequently dismissed because Cooke lacked standing to bring the action. While this matter was in litigation, the state and the plaintiffs opened the stipulated judgment in the inverse condemnation case and agreed to substitute parcel B for parcel

A, thereby leaving the town with parcel A as open space. Title closed on the substituted parcel B and parcel C on January 6, 1990.

After the Superior Court dismissed Torrey Cooke's action, the plaintiffs instituted this action against the defendants alleging intentional and malicious interference with the plaintiffs' business expectations and business relations.[4] The defendants' counterclaim alleges that the transfer by the plaintiffs to the state breached the November 6, 1986 agreement between the plaintiffs and the defendants, and that the breach precluded the defendants from acquiring lot 1 at a price below the fair market value. In the second court of the counterclaim, the defendants allege that the plaintiffs violated CUTPA by misleading the defendants as to their intent and as to any threat of condemnation of the open space property.

The trial court found for the plaintiffs on the complaint, reciting numerous acts of deliberate and malicious interference with the plaintiffs' land transfer to the state. The court stated, however, that "in view of the lack of persuasive evidence on the measure of damages, the court finds certainly that [the plaintiffs] are entitled to nominal damages and awards the sum of one ($1) dollar." The court thereafter held a separate hearing and awarded punitive damages in the amount of $21,080. This appeal and cross appeal followed.

---

4. The plaintiffs alleged that Torry Cooke's injunction action was maliciously instituted, that the defendants had made false statements to state and town official regarding the plaintiffs' property and that the defendants real motive was to force the plaintiffs to buy their property.

Appendix C

I.

The defendants first allege that the trial court made incorrect findings of fact. We view this as a wholesale attack on the court's findings based on a claim that the court could not have reasonably concluded as it did on the bases of the subordinate facts found and the reasonable inferences drawn from those facts. Our review of the record discloses that the trial court reasonably and logically concluded as it did, and that the decision of the trial court was not clearly erroneous in light of the evidence and pleadings in the record as a whole. See *Dalia v. Lawrence,* 226 Conn. 51, 71-72, 627 A.2d 392 (1993).

"On appeal, the function of this court is limited solely to the determination of whether the factual findings of the trial court are clearly erroneous or whether the decision is otherwise erroneous in law. . . . Determining whether a trial court's decision is clearly erroneous involves a two part function: where the legal conclusions of the court are challenged we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, these facts are clearly erroneous." (Citation omitted; internal quotation marks omitted.) *Haynes Construction Co. v. Cascella & Son Construction Co.,* 36 Conn. App. 29, 32, 647 A.2d 1015, cert. denied, 231 Conn. 916, 648 A.2d 152 (1994).

The trial court found that the plaintiffs were not entitled to actual damages and awarded only nominal damages. "Nominal damages mean no damages. They exist only in name and not in

amount." (Internal quotation marks omitted.) *Larsen Chelsey Realty Co. v. Larsen,* 232 Conn. 480, 504, 656 A.2d 1009 (1995); see also *Sessa v. Gigliotti,* 165 Conn. 620, 622, 345 A.2d 45 (1973). Furthermore, such damages "may be a mere peg to hang costs on . . . ." (Internal quotation marks omitted.) *Riccio v. Abate,* 176 Conn. 415, 420, 407 A.2d 1005 (1979). It is also well established that an award of nominal damages is appropriate where there is insufficient evidence produced at trial to prove actual damages. See, e.g., *Expressway Associates II v. Friendly Ice Cream Corp. of Connecticut,* 218 Conn. 474, 477, 590 A.2d 431 (1991).

The trial court gave no reasons for its finding that the plaintiffs were entitled to only nominal damages other than its statement that "a mathematical computation does not necessarily establish damages."[5] The plaintiffs did not file a motion to articulate, and, to the extent that statements elsewhere in the memorandum of decision that the plaintiffs "were indeed damaged" and "damages have occurred" make the decision ambiguous, "we read an ambiguous record, in the absence of a motion for articulation, to support rather than to undermine the judgment." (Internal quotation marks omitted.) *State v. Arisco,* 39 Conn. App. 11, 16, 663 A.2d 442 (1995). We read this record, therefore, to support the trial court's finding that there were no actual damages. Our review of the record discloses nothing that makes this finding clearly erroneous.

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5. The trial court did state that the 10 percent interest penalty in the stipulation between the plaintiffs and the state was the state's obligation. This statement, although correct, does not help in determining the basis of the court's decision on damages. Moreover, the statemnt makes no difference in light of the defendants' claim that the interest rate in the stipulation is simply illustrative of what would be a reasonable rate of interest, not that the defendants were bound by the stipulation.

Appendix C

II.

We turn now to the question of whether the trial court's finding that the plaintiffs failed to prove damages precludes a judgment for the plaintiffs. The defendants did not claim on appeal that it was improper for the trial court to award nominal damages in a case involving tortious interference with a business relationship after finding no actual damages. We address this issue as a matter of plain error.[6] We "may in the interest of justice notice plain error not brought to the attention of the trial court. Practice Book § 4185. Such review is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . An important factor in determining whether to invoke the plain error doctrine is whether the claimed error result[ed] in an unreliable verdict or a miscarriage of justice." (Citations omitted; internal quotation marks omitted.) *State v. Knight,* 29 Conn. App. 675, 676-77, 617 A.2d 913 (1992). Plain error review may be appropriate "where consideration of the question is in the interest of public welfare or of justice between the parties." (Internal quotation marks omitted.) *Skrzypiec v. Noonan,* 228 Conn. 1, 15, 633 A.2d 716 (1993).

The essential elements of the tort of unlawful interference with a business relationship are (1) a business relationship between the plaintiff and another party, (2) the defendant's intentionally interfering with it while knowing of the relationship and (3) as a result of the interference, the plaintiff's suffering

6. The parties, at our direction, submitted supplemental briefs after oral argument on the following question: "Did the trial court commit plain error in awarding nominal and punitive damages despite its finding that the plaintiffs failed to prove actual damage. See *Taylor v. Sugar Hollow Park, Inc.,* 1 Conn. App. 38, 39, 467 A.2d 935 (1988)."

actual loss. *Harry A. Finman & Son, Inc. v. Connecticut Truck & Trailer Service Co.*, 169 Conn. 407, 415, 363 A.2d 86 (1975); see also *Herman v. Endriss*, 187 Conn. 374, 377, 446 A.2d 9 (1982).

This court has held that it was improper for a trial court to award a plaintiff $3500 in damages after finding that a defendant had tortiously interfered with the plaintiff's business expectancy, but that there was no credible evidence of actual damage. We stated that "[u]nlike other torts in which liability gives rise to nominal damages even in the absence of proof of actual loss . . . it is an *essential element* of the tort of unlawful interference with business relations that the plaintiff suffered actual loss." (Citation omitted; emphasis added.) *Taylor v. Sugar Hollow Park, Inc.* 1 Conn. App. 38, 39, 467 A.2d 935 (1983).

It is beyond dispute that the trial court found that the plaintiffs were damaged by the acts of the defendants. The court stated: "Those various and sundry acts, together with the initial 'extractions' obtained from the [plaintiffs] by the [defendants], the funds which the [plaintiffs] paid to them for the potable water system which might suggest the word extortion to a lay person and the comment, 'pay me a million dollars for my property and I will go away,' all of which the court finds to be credible, constrains [me] to find that the motive indeed was malicious and the interference resulting in the injury is certainly wrong beyond the fact of the interference itself. . . . The nexus between the tortious conduct and injury to the [plaintiffs] becomes immediately apparent. The malicious motivation and the obvious success of the improper conduct lead to a single inescapable conclusion, and that is that the [plaintiffs] were indeed damaged by these acts of the defendants. The evaluation of those damages, however, is most difficult to ascertain."

Appendix C

We recognize the distinction between "damage" and "damages." The word "damage" is defined as the "[l]oss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property. The word is to be distinguished from its plural, 'damagers' which means a compensation in money for a loss or damage. . . . By damage, we understand every loss or diminution of what is a man's own, occasioned by the fault of another. . . ." Black's Law Dictionary (4th Ed. 1951). The pecuniary compensation for loss, detriment or injury is "damages"; actual damages are synonymous with compensatory damages and with general damages. "Although the words, 'damage,' 'damages' and 'injury,' are sometimes treated loosely as synonymous, there is a material distinction between them. Injury is the illegal invasion of a legal right; damage is the loss, hurt, or harm which results from the injury; and damages are the recompense or compensation awarded for the damage suffered. 22 Am. Jur. 2d [Damage] § 1." Ballentine's Law Dictionary (3d Ed. 1969), p. 303.

It is an essential element of the tort of unlawful interference with business relations that the plaintiff suffered actual loss, i.e., damage; *Taylor v. Sugar Hollow Park, Inc.*, supra, 1 Conn. App. 39; "actual damage suffered", *Goldman v. Feinberg*, 130 Conn. 671, 675, 37 A.2d 355 (1944); "that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit." Id. Such a determination is a question for the trier of fact; *Harry A. Finman & Son, Inc. v. Connecticut Truct & Trailer Service Co.*, supra, 169 Conn. 415; as is the question of whether the plaintiff has suffered "actual loss." Id. "A plaintiff states an actionable cause [for tortious interference with a contract] by alleging that the defendant intentionally interfered with a

business or contractual relationship of the plaintiff and that the plaintiff, as a result, has suffered an *actual loss*." (Emphasis added). *Herman v. Endris*, supra, 187 Conn. 377.

The trial court found that the plaintiffs had sustained or suffered actual damage, or actual loss, but the court could not mathematically compute the precise or approximate pecuniary compensation, or damages, for that loss. The actual damage was some or all of the nine month and five day delay in consummating the almost three million dollar transaction pursuant to the stipulated judgment.

III

The defendants claim that the trial court improperly rendered judgment for the plaintiffs on the defendants' counterclaim because (1) the plaintiffs breached the covenant of good faith and fair dealing implicit in the November 6, 1986 contract between the plaintiffs and the defendants, (2) the plaintiffs breached the November 6, 1986 contract by transferring lot 1 as part of parcel C to the state, thereby vitiating the defendants' right to purchase the lot at a price below the fair market value, and (3) the defendants proved that the plaintiffs violated CUTPA.

The trial court's memorandum of decision does not address the defendants' claim of a violation of the implied covenant of good faith and fair dealing and the defendants did not request an articulation from the trial court on that issue. The record is, therefore, inadequate for us to review this claim. See *Wilson v. Hryniewicz*, 38 Conn. App. 715, 720, 663 A.2d 1073, cert. denied, 235 Conn. 918, 665 A.2d 610 (1995); *DeLuca v. DeLuca*, 37 Conn. App. 586, 588, 657 A.2d (1995).

Appendix C

We agree with the trial court's finding that the plaintiffs clearly gave the state a deed in lieu of condemnation with respect to parcel C, eliminating the defendants' option to purchase lot 1 pursuant to the terms of the November 6, 1986 agreement. The agreement states: "The foregoing [right to purchase lot 1] is subject to possible condemnation by the state of Connecticut for highway purposes or deed to the state of Connecticut in lieu of said condemnation." This clause disposes of the defendants' claim and no further discussion is warranted.

The defendants' sparsely briefed CUTPA claim is no more than an assertion that the trial court should have credited the defendants' evidence and found in their favor. Our review convinces us that the trial court's rejection of the CUTPA claim was not clearly erroneous.

IV

By way of cross appeal, the plaintiffs claim that the trial court improperly (1) limited the award of punitive damages to the amount of attorney's fees incurred by the prevailing party, and (2) concluded that the plaintiffs failed to establish the amount of their consequential damages and awarded the nominal sum of $1 in consequential damages.

The plaintiffs first argue that punitive damages in addition to attorney's fees were warranted. Such damages are limited to the expenses of litigation less taxable costs. *Berry v. Loiseau,* 223 Conn. 786, 827, 614 A.2d 414 (1992). We, as an intermediate appellate court, will not reexamine or reevaluate Supreme Court precedent; whether such precedent should be reevaluated and possibly discarded is not for this court to decide. *Somohano v. Somohano,* 29 Conn. App. 392, 393-94, 615 A.2d 181 (1992).

Appendix C

The plaintiffs next claim that the trial court improperly failed to establish the amount of consequential damages. They argue that it was clear abuse of discretion by the trial court, having determined that the plaintiffs did not collect $2.8 million until nine months and five days after they otherwise would have collected it because of the actions of the defendants, not to award consequential damages in excess of the nominal award of $1. We do not agree.

Our review of the record discloses that the trial court properly concluded that the plaintiffs had failed to sustain their burden in presenting sufficient evidence for the awarding of compensatory damages. The burden of proving damages is on the party claiming them. *Gargano v. Heyman,* 203 Conn. 616, 620, 525 A.2d 1343 (1987). Claimed damages are an essential element of the proof and must be proved with reasonable certainty. *Simone Corp. v. Connecticut Light & Power Co.,* 187 Conn. 487, 495, 446 A.2d 1071 (1982). The plaintiffs argued that a 10 percent interest amount was the proper measure of damages, as the amount written as a penalty in the plaintiffs' stipulation with the state. The trial court properly noted that the penalty had been deleted from the revised stipulated judgment, and also that while that might have been the state's penalty, there had been no evidence presented that such a penalty was transferable to the defendants. The record is also devoid of any evidence that the substitution of properties that facilitated the actual closing could not have been done anytime after the defendants sued the town of Ridgefield. While it is clear that some delay was caused by the action of the defendants, no evidence was presented to demonstrate that the plaintiffs' transaction with the state could not have been accomplished earlier than in nine months and five days.

The judgment is affirmed.

In this opinion LAVERY, J., concurred.

Appendix C

SPEAR, J., dissenting. I concur with that part of the majority opinion that affirms the judgment of the trial court on the defendant's counterclaim. I respectfully dissent with respect to the trial court's judgment on the plaintiffs' complaint. I conclude that it was plain error[1] for the court to award nominal damages on the plaintiffs' claim of tortious interference with a business relationship after finding that no actual damages were proven. Accordingly, I would reverse the judgment on the complaint.

The majority correctly points out the "[u]nlike other torts in which liability gives rise to nominal damages even in the absence of proof of actual loss . . . it is an *essential element* of the tort of unlawful interference with business relations that the plaintiffs suffered actual loss." (Citation omitted; emphasis added.) *Taylor v. Sugar Hollow Park, Inc.*, 1 Conn. App. 38, 39, 467 A.2d 935 (1983); see also *Conrad v. Erickson*, 41 Conn. App. 243, 246-47, 675 A.2d 906 (1996). I view *Taylor* as standing for the proposition that it is impermissible to award nominal damages in a case involving tortious interference with business relations where actual damages have not been proven. The trial court's failure to find actual damages is thus fatal to the plaintiffs' cause of action here.

The precedent on which *Taylor* rests includes *Goldman v. Feinberg*, 130 Conn. 671, 37 A.2d 355 (1944). In *Goldman*, our Supreme Court stated with respect to a case involving tortious interference with business relations: "In other words, it does not appear that the plaintiff has sustained any damage as a result of those acts. For that reason the plaintiff has not made out a

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1. The majority has properly stated the plain error rule and noted that the parties were given the opportunity to file supplemental briefs on the question of plain error.

complete cause of action for unlawful interference with his business," Id., 676. "A plaintiff states an actionable cause by alleging that the defendant intentionally interfered with a business or contractual relationship of the plaintiff and that the plaintiff, as a result, has suffered an actual loss." *Herman v. Endriss,* 187 Conn. 374, 377, 446 A.2d 9 (1982).

The majority addresses our holding in *Taylor* by stating that the trial court found that the plaintiffs had suffered actual damage, but the court could not mathematically compute the "precise or approximate pecuniary compensation, or damages, for their loss. The actual damage was some of all of the nine month and five day delay in consummating the almost three million dollar transaction pursuant to the stipulated judgment." I disagree.

The trial court stated: "However, a mathematical computation does not necessarily establish damages, despite the nature of the defendants' interference and despite the fact that the tort had been made out and damages have occurred. *In view of the lack of persuasive evidence* on the measure of damages, the court finds certainly that the trustees are entitled to nominal damages and awards the sum one ($1) dollar." (Emphasis added.) It is clear that it was the lack of evidence that led the court to deny compensatory damages to the plaintiffs and not the difficulty of mathematically computing the loss. More important, the plaintiffs point to no evidence that the defendants were responsible for the delay in closing the sale of their land to the state. They simply assert that the transaction would have closed by April 12, 1989, had Torrey Cooke not brought suit to prohibit the transfer. The plaintiffs then reason that they are entitled to interest on $2,800,000 from April 21, 1989, to January 26, 1990, the date of the closing with the state.

Appendix C

My review of the evidence discloses that the town filed suit by way of a complaint dated April 17, 1989, for a declaratory judgment seeking to authorize the transfer of parcel A to the plaintiffs in exchange the transfer of parcel A to the plaintiffs in exchange for parcel B. The matter was returnable to the Superior Court on May 2, 1989, and was apparently pending during the entire period of time that the plaintiffs claim that the defendants were responsible for the delay in closing. This action could well have caused the trial court to conclude that the defendants were not responsible for any part of the delay in closing the transaction. Obviously, the plaintiffs could not convey parcel A to the state until they acquired it from the town and the town, by its own action, decided that a court ruling was necessary prior to conveying parcel A to the plaintiffs.

In its lawsuit, the town alleged that parcel A is "open space and therefore public, and thus governed by the charitable use statute section 47-2 of the Connecticut General Statutes." The town, thus, agreed with the defendant Torrey Cooke's claim in her lawsuit that parcel A was open space that was governed by General Statutes § 47-2. The town's action was dismissed on December 7, 1990, for failure to prosecute with reasonable diligence, a time well after the closing of January 26, 1990. In view of the evidence, the trial court's conclusion that the plaintiffs failed to prove damages is certainly supported in the record. It is clear that four days before the April 21, 1990 closing deadline the town had decided that it would not convey parcel A without a declaratory judgment ruling from the Superior Court. That decision apparently did not change during the nine month, five day period in question and parcel A was never transferred to the plaintiffs.

I conclude that plain error review and reversal is proper here because the judgment for the plaintiffs on the complaint is

directly contrary to the holding of *Taylor*. It is axiomatic that Supreme and Appellate Court precedent that is directly on point binds the Superior Court. Plain error review may be appropriate "where consideration of the question is in the interest of public welfare or of justice between the parties." (Internal quotation marks omitted.) *Skrzypiec v. Noonan*, 228 Conn. 1, 14-15, 633 A.2d 716 (1993). To allow the judgment to stand would constitute an injustice between the parties because the improper award of nominal damages was the predicate for the award of punitive damages consisting of the plaintiffs' attorney's fees of $21,080. Because the award of nominal damages was improper, the punitive damage award is also improper.

I would reverse the judgment for the plaintiffs on the complaint and remand the case to the trial court with direction to render judgment for the defendants on the plaintiffs' complaint.

APPENDIX D — MEMORANDUM OF DECISION OF THE SUPERIOR COURT FOR THE JUDICIAL DISTRICT OF DANBURY DATED AUGUST 24, 1994

SUPERIOR COURT

JUDICIAL DISTRICT OF DANBURY

AUGUST 24, 1994

NO. 29 93 04

NICHOLAS R. DINAPOLI, JR., TRUSTEE, CARL H. LECHER, TRUSTEE

V.

JOHN P. COOKE AND TORREY M. COOKE

MEMORANDUM OF DECISION

The instant proceeding finds it genesis in a complaint alleging intentional, deliberate and malicious interference with business expectations and business relations. The plaintiffs (hereafter "Trustees") were the owners and prospective developers of a certain tract, piece or parcel of land situated on Nod Hill Road and Old Branchville Road in the Town of Ridgefield, County of Fairfield in the State of Connecticut.

That tract consisted of approximately forty-nine (49) acres and was the subject matter of a submission to the Ridgefield Planning and Zoning Commission for the approval of a planned residential development. The Commission approved that application which was shown and designated on a certain map entitled, "Final Plan Nod Road A Planned Residential

Development" under date of January 30, 1986, which map was amended October 6, 1986, finally amended October 16, 1986, and map is on file in the office of the Town Clerk of Ridgefield as Map No. 7361. The Commission endorsed its approval for filing on November 18, 1986, and that filing occurred on November 19, 1986. Included within the approval, were certain conditions, one of which required the Trustees to convey approximately eighteen (18) acres more or less of the subdivision to the Town of Ridgefield to be dedicated to open space.

In the early 1970's, the Department of Transportation inaugurated a plan to construct a new controlled access highway to replace the then and currently existing Route 7 between Norwalk and Danbury. It appears as though the department conducted extensive surveying and filed what might be appropriately termed taking maps in the office of the town clerk of Ridgefield on February 15, 1972. In the mid-80's, the Trustees, certainly being conscious of the information existent in the community concerning the Department of Transportation's plans for the reconstruction, made inquiry of the department as to status of the construction taking and whether or not any condemnation proceedings existed against this piece of property. On two occasions, they were advised that there were no condemnation proceedings against this property, there had been no taking of this property, and the plans for all intents and purposes were lying dormant.

Armed with those two separate assurances from the department, the Trustees conveyed eighteen (18) acres more or less of the approved subdivision to the Town of Ridgefield as open space in accordance with the condition of approval. This was done in November, 1986, the day following the filing of their approved map. During that same month, they began

construction of the subdivision roadway. Thereafter, on January 30, 1987, the Department of Transportation advised the Trustees that the State of Connecticut would proceed at that time to acquire a portion of their property. Thereupon, the Trustees advised the department in early April of 1987 that they had ended any activity with respect to construction in the proposed subdivision as a result of the pending acquisition of a portion thereof. The department reiterated its notice to them as well as to say that the plans to acquire a portion of their property were proceeding and that appraisals had been scheduled. This was on May 20, 1987.

However, in the latter months of 1987, the Governor's Screening Committee became concerned over the wisdom of the purchase. In March of 1988, the Trustees were informed that the plan to acquire a portion of their property had been postponed indefinitely and from thereon there would be no negotiations regarding any price for the acquisition.

This termination and disclaimer of any interest in additional efforts and negotiations gave rise to an action by the Trustees against the State alleging an inverse condemnation of their property. In due course, negotiations reopened and continued resulting in a settlement of the action. The terms of the settlement were that the State would pay the Trustees the sum of two million eight hundred thousand ($2,800,000) dollars. The Trustees in lieu of condemnation would convey two parcels of property to the State. Those two parcels aggregated eighteen (18) acres and were not contiguous. The first of the two was a ten (10) acre parcel, more or less, which was carved from the open space area and the second was an eight (8) acre parcel from the "unencumbered" approved subdivision. In order to fulfill the Trustees' obligation under this settlement agreement,

it was necessary to reacquire title to the ten (10) acre parcel which had been conveyed to the Town of Ridgefield. A proposal was submitted to the municipality wherein an equal size parcel from the subdivision itself was to be substituted and the town was to reconvey the ten (10) acre parcel necessary to effectuate the settlement to the Trustees.

In February of 1989, favorable municipal administrative action on the proposed substitution was obtained from the Board of Selectmen, the Conservation Commission, and the Planning and Zoning Commission. These approvals were ratified and confirmed at a town meeting on February 22, 1989. Immediately thereafter, the Trustees and the State executed a stipulation which was submitted to, approved by and made a judgment of the Superior Court on March 6, 1989. A copy of that stipulation is appended hereto and incorporated herein where applicable as **Appendix I.** The parcels in issue addressed therein were Parcel A, 10.271 acres, and Parcel C, 8.230 acres.

Paragraph 2b of the judgment provided that the conveyance of Parcel A was for "no consideration." The entire two million eight hundred thousand ($2,800,000) dollars was paid for Parcel C. The judgment also required interest at the rate of 10 percent per annum to be paid forty-five (45) days from the date of its entry. The interest requirement which might well be construed as a penalty of sorts against the State for late payment and expedited the closing on the property prior to April 21, 1989, when that interest was scheduled to accrue.

The defendants, John P. Cooke and Torrey M. Cooke, are the owners of a certain tract, piece or parcel of land situated on the southeasterly side of Old Branchville Road in the Town of Ridgefield, County of Fairfield, and State of Connecticut which

partially abuts the Trustees' property on what might generally be defined as the northerly boundary of the northeast segments.[1] These neighbors became formidable opponents of the Trustees' subdivision, and the defendant John was heard to express that opposition at the town meeting on February 22, 1989. Being dissatisfied and disappointed with the result of that meeting, Torrey M. Cooke, brought an action on March 8, 1989 for a temporary injunction by virtue of an order to show cause against the Town of Ridgefield and the State to preclude the property exchange. As a result of that pending litigation, the First Selectperson of Ridgefield did not execute or deliver the deed contemplated by and approved by the town meeting. It goes without saying that the closing never occurred. The Attorney General representing the State moved to dismiss the complaint, alleging a lack of standing by Cooke to prosecute the allegations concerning a violation of certain statutory trusts enacted for public and charitable use. On April 14, the day following the motion to dismiss, Cooke filed an amendment to her complaint and attempted to obtain a writ of mandamus against the Attorney General to enforce the statutory charitable trust created by the Trustees' donation to the town for the open spaces. The Attorney General countered the amendment with a second motion to dismiss the amended complaint as well.

On August 1, 1989, the court granted the Attorney General's motion expressly finding that Cooke had no standing to bring, to present or maintain the action. The ruling was also dispositive of the issue directed toward the enforcement of the charitable trust. The court noted that "[t]he remedy sought by the plaintiff is to prohibit exchange not examine its efficacy and appropriateness."[2] Cooke filed an appeal on August 17, 1989,

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1. See Plaintiffs' Exhibit 2 for directional definitions.

2. See Plaintiffs' Exhibit 16, p. 13.

and on October 17, 1989, the Appellate Court dismissed the appeal on the basis of a lack of subject matter jurisdiction. Litigation expenses on behalf of the defendants was paid for by John P. Cooke.

The Trustees, frustrated by the defendants' vehement attempts to preclude the consummation of the stipulated judgment at the public hearing and in the ensuing litigation, agreed with the State to open the judgment and substitute Parcel B for Parcel A. The necessary exchange between the town and the State was now under the purview of that agreement. The closing on the substituted parcels occurred on January 26, 1990, and the consideration was paid to the Trustees.

During the defendants' extremely active opposition, Torrey Cooke complained to the Ridgefield Police Department and the Ridgefield Zoning Enforcement Officer that one of the Trustees, Lecher, was removing rocks from a stone wall on the property. Lecher denied this activity and no proof of that conduct was ever offered by the defendants. The Ridgefield Police Department closed the file on the complaint and the Zoning Enforcement Officer found no violation whatsoever. Lecher next prepared to fill some low spots on the proposed roadway with construction debris. The defendant Torrey again complained to the Ridgefield zoning authorities that the action was in violation of the regulations. Again, no offer of proof much less evidence of such a violation was presented at any time including the trial of this matter. Perhaps the state of mind of the defendants Cooke is best expressed by a letter Torrey wrote to one Inglese about Lecher. "If the man is mad because I am holding up his $2,800,000 from DOT because of a lawsuit, should he trash that very land he is selling?" [3]

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3. Plaintiffs' Exhibit 18.

Appendix D

The defendants assert that their intent was indeed the recognition of the quality of Parcel A over Parcel B is wetlands. However, they offered no evidence nor any offer of proof to satisfy that statement. The Trustees believe, and indeed assert, that the defendants' acts are self-serving and malicious acts rather than pure, altruistic and public spirited. They cite the fact that the Trustees were required to pay the defendants twenty-two thousand five hundred ($22,500) dollars for a new well on the defendants' property. The defendants never drilled that well which could in fact have been completed at a sum of between three thousand five hundred ($3,500) dollars and five thousand ($5,000) dollars. The second illustration which the Trustees seized upon is John Cooke's demand that the Trustees pay him and his wife one million ($1,000,000) dollars and they would "go away." The final example of bad faith of the defendants is demonstrated by their conduct after Parcels B and C were conveyed to the State. The attempt to exercise the "option" they had to purchase Lot No. 1 in the subdivision, even though the option is clear on its face that it is subject to defeasance by condemnation or by a deed to the State in lieu of said condemnation. That "option" appears as **Appendix II** appended hereto and fully incorporated herein.

The defendants have responded to the Trustees' complaint with an answer and two special defenses. The first recites that the open space property which was to be conveyed to the State of Connecticut in accordance with a judgment entered in accordance with the stipulation is indeed subject to a charitable use or trust and must be maintained in perpetuity as open space. Conveyance from the town to the Trustees for the purpose of reconveyance to the State in accordance with such judgment is violative of Secs. 47-2 and 45-79 of the General Statutes.

Appendix D

The second special defense alleges that a contract between the Trustees and the defendants, dated on or about November 6, 1986, which in essence mandated the Trustees maintain the subdivision plan for open space in perpetuity of the portion abutting the defendants' property, constituted consideration for the defendants' promise not to oppose that application nor to appeal its approval. After alleging the satisfaction of that contractual obligation by the defendants, they assert that the Trustees induced the town to breach its obligation as a trustee under the cited statutes by the vehicle of the judgment entered upon the stipulation wherein the originally designated open space property was to be conveyed to the State of Connecticut.

The defendants have also filed a counterclaim in two counts alleging an anticipatory breach of the November 6, 1986 contract "as a result of which defendants have been injured." The second count of the counterclaim incorporates the first by reference and attempts to invoke the provisions of Sec. 42-110b et seq. of the General Statutes. (Connecticut Unfair Trade Practices Act — CUTPA.)

The prayer for relief demands a temporary and permanent injunction restraining the Trustees from "breaching their agreement with the defendants," and money damages from the Trustees on the CUTPA claim, together with punitive damages, costs and counsel fees under CUTPA.

We in Connecticut have long recognized the cause of action for tortious interference with contractual rights or other business relations, and have unequivocally declared that not every act which disturbs the contract or business expectancy is actionable. A successful plaintiff is required to satisfy the threshold requirement that the defendants' conduct be in fact tortious. This

requirement may be satisfied by proof of fraud, misrepresentation, intimidation, molestation or malice. While this cause requires more than the proof of the existence of a business relationship, the defendants; interference therewith and the resulting loss to the plaintiff, the plaintiff must also plead and prove at least some improper motive or improper means. " '[A] claim is made out [only] when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself.' " *Blake v. Levy,* 191 Conn. 257, 262.

The *Blake* court relied extensively on the restatement to resolve the issue of whether or not an actor's behavior is improper. In determining whether or not an actor's conduct which intentionally interferes with a contract or a prospective contractual relationship with another is improper consideration given to the following factors: "(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interest sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interest of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties." *Blake v. Levy,* supra, 263 n.3, citing to 4 Restatement (Second), Torts, Sec. 767 (1979).

The factual predicate necessary to establish a valid business relationship or expectancy has been set forth at length by the court earlier in this decision. The Trustees' relationship with the State of Connecticut with its agreements and controversy ultimately was settled and memorialized in a stipulation, and declared to be a judgment by the court. This is more than adequate. One need not undertake an experience in the land of fantasy to find that the judgment would have been satisfied by

both parties had not the defendants instituted a proceeding for injunctive relief to prevent that satisfaction. The net effect of that procedure was to frustrate the satisfaction of the judgment. The issue of the defendants' knowledge of that relationship or expectancy requires nothing more than a mention that the defendants admitted knowing of the exchange between the Trustees and the Department of Transportation.

Was there indeed an interference with the plaintiffs' business relationship or expectancy? This question cries out for an affirmative response. Litigation was instituted prior to the satisfaction of the judgment. While the litigation failed at the trial level and also in the appellate proceeding which followed the dismissal in the trial court, its purpose was successfully accomplished. The evidence offered clearly establishes that the First Selectperson of the Town of Ridgefield refused to execute the deed in satisfaction of the judgment as a result of their pending litigation. While the litigation was the primary attack, the defendants pursued secondary efforts by writing to local and state officials in an attempt to prevent the exchange from occurring.

In speaking to the issue of an improper motive or the means of the interference, the court takes its guidance from *Blake v. Levy,* supra, and its use of 4 Restatement (Second), Torts, which again has been cited earlier in this memorandum. The testimony as well as the conduct of the defendants is interesting but strikingly transparent. The prospect of the aesthetic observation of woodlands from Cooke's living room window obstructed or inhibited by a dwelling were unpleasant and upsetting to him. Their mission to protect their property was quite obvious in their appearances before the municipal bodies and their participation in the municipal legislative process. The

juxtaposition of their well respect to the Trustees' property proved to a source of a demand that the plan be amended so as not to cause their own water supply to be placed in jeopardy. Their efforts achieved a degree of success in that the Commission, in prescribing conditions for the approval of the subdivision, required that two lots be combined immediately adjacent to their property into one large lot and that the Trustees would drill a new well together with the necessary piping therefor to provide them with potable water. At an early stage in the proceeding, the defendants' litigation utilizing the appellate process from the approval by the Planning and Zoning Commission led to the agreement by which the Trustees were to drill a new well accompanied by the necessary system to provide them with drinking water and, more importantly, to grant them an "option" to purchase the new oversized lot for a consideration which may be best described as a substantially discounted purchase price.

The consideration the defendants promised in the agreement was their commitment to refrain from opposition to the development of the subdivision. The Trustees have established that the defendants have blatantly violated that commitment.

One must examine the litigation pursued by the defendants to determine whether or not it was a valid exercise of their legal rights or an improper interference designed to frustrate the judgment entered by the court in accordance with the stipulation of the parties. The defendant Torrey's attempt to clothe herself with the mantle of a protection of open spaces never survived the motion to dismiss because the trial court correctly ruled, which ruling survived the scrutiny of appellate review that she had no legal right or standing to institute or to pursue that proceeding. Standing is a fundamental requisite to evoke the

jurisdiction of the court. An analysis of the injunctive procedure and subsequent appellate review can only lead to the conclusion that the action was indeed obstructive and contemplated frustrating the judgment. The complaints which she made to the police department and the Zoning Enforcement Officer which evoked the response from each of those agencies produced no suggestion of validity and provide another example of obstructionism and interference.

The scenario with the Wier Farm property also serves to quite adequately demonstrate the mental state of the defendants. The defendant Torrey who professed an interest in ecology claimed to be very disturbed by the proposed exchange of Parcel A for Parcel B. After describing the parcels, she testified that she believed that such an exchange would have a damaging effect on the Wier Farm property. Expressed in terms of a charitable interpretation, one might argue that her motive was altruistic. That argument pales with the revelation that the Wier Farm project manager endorsed, approved and indeed supported the exchange of land. Despite her poor ability to recall any information or documentation or statement to support her posture at trial, it became evident that this particular conduct was also designed to preclude and to frustrate the satisfaction of the judgment.

While it may well be argued that these acts of the defendants were motivated by their dedication to protect, to preserve, and to advance the public good, that argument is easily recognized as fatally flawed when the cumulative effect of these acts is considered. Those various and sundry acts, together with the initial "extractions" obtained from the Trustees by the Cookes, the funds which the Trustees paid to them for the potable water system which might suggest the word extortion to a lay person

and the comment, "[p]ay me a million dollars for my property and I will go away," all of which the court finds to be credible, constrains it to find that the motive indeed was malicious and the interference resulting in the injury is certainly wrong beyond the fact of the interference itself. See *Top Service Body Shop, Inc. v. Allstate Ins. Co.*, 283 Oregon, 209; *Blake v. Levy*, supra.

The nexus between the tortious conduct and injury to the Trustees becomes immediately apparent. The malicious motivation and the obvious success of the improper conduct lead to a single inescapable conclusion, and that is that the Trustees were indeed damaged by these acts of the defendants. The evaluation of those damages, however, is most difficult to ascertain. The stipulation between the Trustees and the State of Connecticut resolving the litigation sounding in inverse condemnation was executed on February 28, 1989, and provided, inter alia, in paragraph 2a thereof:

> Interest at the rate of 10% per annum shall accrue on said sum commencing 45 days from the date of Court approval of this Stipulation.

That sentence was deleted in the judgment entered by the court on the stipulation. A substitution of "[t]he parties shall close this transaction within forty-five days of the date upon which the Superior Court enters an order granting this Motion to Reopen Judgment. Time shall be of the essence." The Trustees take that 10 percent and would apply it to the nine (9) months in five (5) days which elapsed between the scheduled closing and the actual date of closing. The computation of interest on two million eight hundred thousand ($2,800,000) dollars at that 10 percent figure is two hundred thirteen thousand eight hundred

eighty-eight dollars and ninety ($213,888.90) cents. That penalty prior its deletion was the obligation of the State. The argumentative application of that percentage rate and the number produced is fascinating. However, a mathematical computation does not necessarily establish damages, despite the nature of the defendants' interference and despite the fact that the tort had been made out and damages have occurred. In view of the lack of persuasive evidence on the measure of damages, the court finds certainly that the Trustees are entitled to nominal damages and awards the sum of one ($1) dollar. The award, however, does not end with this determination. The prayer for relief from the plaintiffs' complaint includes a claim for punitive damages. This court is satisfied that the validity of such a claim, as framed by these facts and these findings, is indeed justified. The Trustees are, accordingly, ordered to claim the issue of punitive damages for hearing and the award of so much thereof as may be appropriate.

The defendants' special defenses claiming a charitable use of trust impressed upon the property and the violation of the agreement between the parties under date of November 6, 1986[4] have certainly not been established. The injunctive action instituted by the defendants against the Attorney General and the local municipality which was directed at preventing the town from conveying the open space property conveyed to it by the Trustees, in accordance with the stipulation which was reduced to judgment as previously recited, is legally and factually inadequate. That conveyance simply never occurred, and therefore any claim the defendants may have in support of the charitable trust argument cannot be reached on this factual predicate. The question of standing to raise such an argument,

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4. Plaintiffs' Exhibit 6.

which was addressed adversely to the defendants by the court, Green, J., in her opinion, remains the law of the case. This court finds it unnecessary to reach or discuss that opinion beyond that holding.

The first count of the defendants' counterclaim sounds in the anticipatory breach of the agreement between the parties dated November 6, 1986. Numbered paragraph 3 of that agreement recites; "For a period of six (6) months following the expiration of the five (5) year period described in paragraph 2e above, the Cookes shall have an option to purchase Lot #1 at a price equal to 85% of the fair market value as determined by an independent MAI certified real estate appraiser agreed upon by the parties. Notice of the exercise shall be by certified mail prior to April 21, 1992 otherwise this provision shall be void. The foregoing option right is subject to possible condemnation by the State of Connecticut for highway purposes or deed to the State of Connecticut in lieu of said condemnation." In support of that claim, they postulate that no condemnation occurred and that the Trustees' suit against the State of Connecticut alleging an inverse condemnation was not a condemnation in any sense of the word. They also assert that the stipulation for judgment entered into between the parties to settle that litigation, which stipulation became a judgment, was neither a condemnation nor deed in lieu of condemnation. The argument is neither logical nor persuasive and is little more than pure nonsense.

The court finds it unnecessary to discuss the rubrics of a condemnation. However, when one's land is so diminished by the action of the State, or pending action of the State, as to be rendered virtually valueless, or its value substantially diminished, such an action lies (inverse condemnation). The effect of the

action in this case was to compel what indeed was a condemnation. While the judgment was predicated upon a negotiated settlement, the effect of that settlement is to cause the state to own the property and the Trustees to be paid the fair market value of that property. To argue that this is not a condemnation borders on being ludicrous. The referenced paragraph[5] was found by this court to create a condition of defeasance. That condition occurred and the agreement, despite part performance by the Trustees with respect to the conditions impressed upon the approval and the obligation which was consummated to provide a new water system for the defendants, fell under its own weight. The argument offered in support of the claim of bad faith in the argued breach of the implied covenant of good faith and fair dealing neither established bad faith nor the "most egregious acts of bad faith" as postulated by the defendants.

As to the second count, and cause of action asserting a CUTPA violation, this seems to find its way into and make a rather grand entry in many if not most of the cases which come before the court. None of the requisites set forth under *Cheshire Mortgage Service, Inc. v. Montes,* 223 Conn. 80 or *McLaughlin Ford, Inc. v. Ford Motor Co.,* 192 Conn. 558, 567-68, cited by the defendants, have been established by credible evidence offered in support of that theory. Those requisites generally are the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by the statutes, common law, or otherwise, whether, in otherwords, it is within at least the penumbra of some common law, statutory or other established concept of unfairness. It cannot be said to be immoral, unethical, oppressive or

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5. Plaintiffs' Exhibit 6.

unscrupulous and the evidence of a substantial injury to consumers, other than a defendant's displeasure with the impending actions and ultimate result of this action, finds no basis of support in the evidence. The claim for relief under CUTPA has not been approximated much less proven.

Despite the fact that the causes of action set forth in the counterclaim cannot be decided favorably to the defendants, the court would be remiss if it did not mention their claim for damages. There was no evidence whatsoever from an expert as to the fair market value of the property of which they claim they were deprived. The defense certainly recognized and expressed the existence of an equitable conversion by virtue of the agreement dated November 6, 1986, yet made no attempt to direct questions to either of the defendants as the equitable owners of the property to express their opinion as to the fair market value thereof. The approach they pursued was to utilize the amount of money paid to the Trustees by the State of Connecticut for the acreage taken. It was suggested that to find the fair market value of the subject matter of the plaintiffs' Exhibit 6 that the number of acres merely be divided into the purchase price and the fair market value would be established in that fashion. Assuming, arguendo, without agreeing, that this approach constitutes a valid method of establishing the fair market value of property, it is nevertheless unpersuasive. Of the total acreage conveyed, an entire parcel was specifically excluded from any consideration paid by the State of Connecticut. The very best that can be offered is to mathematically compute the fair market value recognizing the diminution of acreage and to accept the premise that no consideration was paid for that parcel. It insults one's intelligence to suggest that the parcel for which no consideration was paid is totally worthless. If this were an acceptable method of proving fair market value of property, it cannot be utilized in this case.

Appendix D

Judgment may enter for the plaintiffs on the complaint, and they are awarded the sum of one ($1) dollar as a nominal, general damages. The plaintiffs, however, are further ordered to schedule a hearing to offer evidence on the issue of punitive damages. Judgement may also enter for the plaintiffs on the defendants' counterclaim.

s/ Howard J. Moraghan
Moraghan, J.

APPENDIX E — STIPULATION DATED FEBRUARY 28, 1989 AND ORDER DATED MARCH 8, 1989

SUPERIOR COURT

JUDICIAL DISTRICT OF DANBURY,

AT DANBURY

FEBRUARY 28, 1989

NO. CV-88-0295189 S

NICHOLAS R. DiNAPOLI, JR., TRUSTEE, ET AL

VS.

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION

STIPULATION

The parties hereby stipulate that a judgment shall enter, without costs, as follows:

1. In lieu of a condemnation taking by the State of Connecticut, the defendant will accept and the plaintiffs will immediately convey, by warranty deed, upon approval to convey "Parcel A" to the defendant at a duly held Town meeting, title to the real property shown as Parcel "A", consisting of 10.271 acres, together with Parcel "C", consisting of 8.230 acres "to be conveyed to the State of Connecticut, Department of Transportation" on a map entitled "Final Plan, Nod Hill, A Planned Residential Development, Nod Hill & Old Branchville Roads, Ridgefield, Connecticut, Scale 1" = 100', January 30, 1986, certified substantially correct by C. James Osborne, Jr.,

Appendix E

Amended October 6, 1986, Amended October 16, 1986, Amended January 25, 1989, and Revised February 21, 1989", which map is attached hereto.

2. a. In return for said warranty deed for Parcel "C", as shown on said map, the defendant will cause the State of Connecticut to pay the plaintiffs the sum of $2,800,000.00. Interest at the rate of 10% per annum shall accrue on said sum commencing 45 days from the date of Court approval of this Stipulation.

b. The plaintiff will convey Parcel "A", as shown on said map, to the defendant for no consideration.

3. With respect to the issues raised in the Complaint in this action, the provisions contained in Paragraphs One and Two of this Stipulation shall be a full and final settlement of the claims and rights of each party as against the other.

THE PLAINTIFFS,
Nicholas R. DiNapoli, Jr., Trustee,
and Carl H. Lecher, Trustee

s/ Jack D. Garmella
Jack D. Garmella, for Cutsumpas, Collins, Hannafin, Garamella, Jaber & Tuozzolo, P.C.
Their Attorneys

THE DEFENDANT,
J. William Burns, Commissioner
of Transportation,

s/ William A. McQueeney
William A. McQueeney, Assistant Attorney General
His Attorney

Appendix E

ORDER

Judgment shall enter in accordance with the above Stipulation.

THE COURT

s/ Wrl
Judge
3-6-89

THIS IS TO CERTIFY that a copy of the foregoing was mailed to all counsel of record on this 28th day of February, 1989.

s/ Jack D. Garamella
Jack D. Garamella

Appendix E

STATE OF CONNECTICUT
SUPERIOR COURT
Judicial District of Danbury

No. CV 88 0295189 S

Nicholas R. DiNapoli, Jr., Trustee

vs.

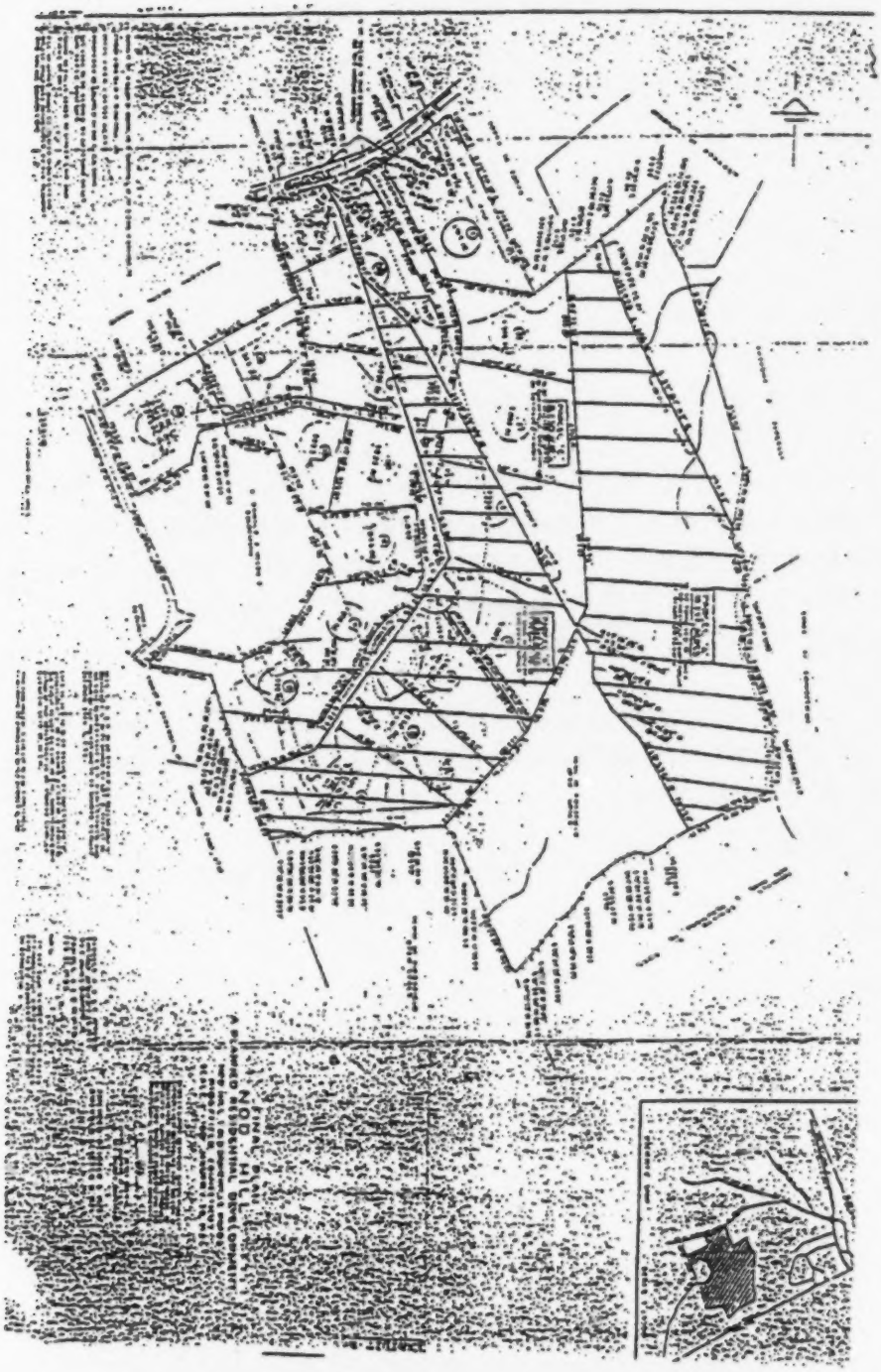
J. William Burns, Commissioner of Transport.

I, Therese A. Servas, Clerk of the Superior Court for the Judicial District of Danbury, hereby certify that the within and foregoing is a true copy of the original Stipulation dated February 28, 1989 and order thereon dated March 6, 1989 — in said cause, as on file and of record appears.

In witness whereof, I have hereunto set my hand and the Seal of said Court at Danbury in said Judicial District this 6th day of March 1989.

Therese A. Servas, Clerk

Appendix E



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APPENDIX F — AGREEMENT DATED OCTOBER 1986

Agreement made this day of October, 1986 by and between John P. Cooke and Torrey M. Cooke (hereinafter "Cooke") of Old Branchville Road, Town of Ridgefield, County of Fairfield, and State of Connecticut and Carl H. Lecher, Trustee and Nicholas R. DeNapoli, Trustee (hereinafter "Owners") both of the Town of Ridgefield, County of Fairfield, and State of Connecticut collectively the "parties."

WHEREAS the Owners have subdivided 49.720 acres into 19 lots (Subdivision) as shown and described on a certain map entitled "Final Plan, Nod Hill, A Planned Residential Development, Nod Hill and Old Branchville Roads, Ridgefield, Connecticut", dated Jan. 30, 1986 and subdivision was approved by the Planning and Zoning Commission on October 21, 1986;

WHEREAS the parties are abutting property owners and it is to their mutual best interest to enter into this agreement;

In consideration of the promises contained herein and other valuable considerations, the parties agree as follows:

1. The Cookes agree not to oppose directly or indirectly the development of the subdivision or appeal the decision by the Planning and Zoning Commission approving the subdivision.

2. The Owners agree as follows:

a. To drill a new water well prior to the completion of the access road and drainage but no later than June 30, 1987 at owners cost on the Cookes property. The Owners will provide the Cookes with a well driller report and Health Department approval of the well;

b. To complete and install a well line to the house including the installation of a new water line installed to the dwelling including excavation, casing, piping below the frost line, wiring, back fill, rough grading, restoration of landscaping and disturbed areas, and the installation of a new "well saver" or equal submursible pump all at owners cost;

c. To place a fifty foot (50') green belt easement on Lot No. 1 which easement area shall remain in its natural state except for normal yard maintenance;

d. That the abutting two (2) lots shown on the January 30, 1986 subdivision plan will be merged into one (1) lot as shown on the above entitled map as Lot No. 1 consisting of 1.917 acres;

e. That Lot No. 1, 1.917 acres abutting the Cooke property will not be built upon until after October 21, 1991.

3. For a period of six (6) months following the expiration of the five (5) year period described in paragraph 2e above, the Cookes shall have an option to purchase Lot #1 at a price equal to 85% of the fair market value as determined by an independent MAI certified real estate appraiser agreed upon by the parties. Notice of exercise shall be by certified mail prior to April 21, 1992 otherwise this provision shall be void.

This agreement shall bind the heirs, executors, successors, and assigns of the parties.

Appendix F

Nicholas R. DiNapoli, Trustee

s/ Paul S. McNamara
Paul S. McNamara

s/ Carl H. Lecher,
Carl H. Lecher, Trustee

s/ Bernadette F. Librizzi
Bernadette F. Librizzi

John P. Cooke

Torrey M. Cooke

STATE OF CONNECTICUT
ss. Ridgefield November , 1986
COUNTY OF FAIRFIELD

Personally appeared Nicholas R. DiNapoli, Trustee signer and sealer of the foregoing instrument and acknowledged the same to be his free act and deed, before me,

STATE OF CONNECTICUT
ss. Ridgefield November 6, 1986
COUNTY OF FAIRFIELD

Personally appeared Carl H. Lecher, signer and sealer of the foregoing instrument and acknowledged the same to be his free act and deed before me,

s/ Paul S. McNamara
Commissioner of the Supreme Court

Appendix F

STATE OF CONNECTICUT

ss. Ridgefield November , 1986

COUNTY OF FAIRFIELD

Personally appeared John P. Cooke and Torrey M. Cooke signers and sealers of the foregoing instrument and acknowledged the same to be their free act and deed, before me,

_____